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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

LIZARDO MARQUEZ-PEREZ,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a guilty plea is valid under Rule 11 of the Federal Rules of Criminal Procedure where the trial court's explanation of the charge to which defendant was offering to enter a guilty plea was limited to reading three paragraphs of a complex conspiracy charge and where the trial court neglected to tell the defendant that if his plea were accepted there would be no further trial and he would be waiving his right to cross-examine witnesses.

2. Whether a motion prior to sentencing to withdraw a guilty plea on the ground, inter alia, that when the plea was entered defendant believed it could be changed at any time prior to sentencing, can be denied without a hearing under Rule 32(d) of the Federal Criminal

Procedure which provides that relief from a guilty plea sought prior to sentencing may be granted on defendant's showing of any fair and just reason.

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OPINIONS BELOW

Neither the United States District Court nor the United States Court of Appeals for the Eleventh Circuit issued opinions in this case.

JURISDICTION OF THE COURT

The judgment of the Court of Appeals was entered on April 23, 1987. (A-1) By order of this Court dated April 9, 1987, the time for filing the petition for a writ of certiorari was extended to May 26, 1987. (A-2).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Rule 11 of the Federal Rules of Criminal Procedure provides in relevant part:

> **(c) Advice to Defendant.** Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands, the following:
>
> (1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law, including the effect of any special parole term and, when applicable, that the court may also order the defendant to make restitution to any victim of the offense; and
>
> (2) if the defendant is not represented by an attorney, that he has the right to be represented by an attorney at every stage of the proceeding against him and, if necessary, one will be appointed to represent him; and
>
> (3) that he has the right to plead not guilty or to persist in that plea if it has already been made, and he has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to confront and cross-

examine witnesses against him, and the right not to be compelled to incriminate himself; and

(4) that if his plea of guilty or nolo contendere is accepted by the court there will not be a further trial of any kind, so that by pleading guilty or nolo contendere he waives the right to a trial; and

(5) if the court intends to question the defendant under oath, on the record, and in the presence of counsel about the offense to which he has pleaded, that his anwswers may later be used against him in a prosecution for perjury or false statement.

(d) Insuring That the Plea is Voluntary. The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or his attorney.

* * *

(h) **Harmless Error.** Any variance from the procedures required by this rule which does not affect substantial rights shall be disregarded.

Rule 32(d) of the Federal Rules of Criminal Procedure provides:

(d) **Plea Withdrawal.** If a motion for withdrawal of a plea of guilty or nolo contendere is made before sentence is imposed, imposition of sentence is suspended, or disposition is had under 18 U.S.C. §4205(c), the court may permit withdrawal of the plea upon a showing by the defendant of any fair and just reason. At any later time, a plea may be set aside only on direct appeal or by motion under 28 U.S.C. §2255.

STATEMENT OF FACTS

On July 27, 1984, a 20 count indictment was returned in the Southern District of Florida which charged 11 persons, but not Petitioner, with conspiracy to violate, and various substantive violations of the federal narcotics laws. On December 19, 1984, a superceding indictment was returned which added two additional defendants -- one of whom was Petitioner Lizardo Marquez-Perez -- and an additional count. Marquez-Perez, a Venezuelan citizen, was charged in four counts. Count 1 was a conspiracy count charging all but one of the defendants with a conspiracy from February 1, 1984 to July 17, 1984 "in the Southern District of Florida, Colombia, South America, Nicaragua, Central America and elsewhere" to import cocaine from outside the United States, in violation of 21 U.S.C. §952(a), and to distribute cocaine, intending that it be

unlawfully imported into the United States, in violation of 21 U:S.C. §959. Count 2 was also a conspiracy count, this one charging all of the defendants with conspiracy to possess cocaine with intent to distribute it. Counts 8 and 9 charged, respectively, importation of cocaine, and possession of cocaine, with intent to distribute.

On December 27, 1984, Petitioner was arraigned and entered a plea of not guilty. His attorney moved to withdraw on Jaunary 25, and was granted leave to do so four days later. New counsel entered an appearance on January 31, 1985. In July, another substitution of counsel occurred.

The majority of alleged co-conspirators were fugitives, and the government proceeded to trial against only four of the defendants:

Petitioner, Felix Dixon Bates, Paul Elzel and Carlos Bustamante. On July 29, 1985, the case was called for trial and jury selection began.

On August 1, 1985, the third day of trial before Judge James L. King and a jury, and before the completion of the testimony of the government's first witness, Petitioner's attorney informed the court that, pursuant to an agreement reached with the U.S. Attorney's office, his client wished to withdraw the not guilty plea he had entered on Count 1. Petitioner would interpose a plea of guilty on that count, in exchange for dismissal of the remaining counts at the time of sentencing.

A Rule 11 hearing followed. The Petitioner was sworn, stated that he was 50 years old, and declined the services of an interpreter. Judge King informed Petitioner that the law required that he ask certain questions about the plea in order to satisfy

himself that the plea was freely and voluntarily made. The court read to Petitioner an abbreviated paraphrase of the first paragraph of Count 1; one of its "ways and means paragraphs"; and the one overt act in which Petitioner was mentioned. Petitioner answered, "yes, Your Honor" when asked whether he had had the opportunity to read that count of the indictment, whether he was sufficiently conversant in the English language to read it, and whether he had had a chance to go over the charge with his attorney.

A little later in the proceedings, the court asked Petitioner whether his attorney had advised him of his rights under American law which would be waived by the guilty plea. Petitioner answered "yes."

The court stated:

> Among those rights, has he told you that you would be entitled to continue with this jury trial, which is now in its fourth day, and that you would

be entitled to go forward with the trial, requiring the government to prove each and every element of the Count 1 and the other counts wherein you are named beyond and to the exclusion of all reasonable doubt? Has he told you that; that you have the right to go forward?

* * *

Has he told you that you have the right in this jury trial to call witnesses, if you wish, in your own behalf, to take the witness stand and testify, if you should wish to do so, although no one can force you to do so, and no one can comment on your failure not to do so, if you should elect not to do so?

That you have the right to take an appeal from any adverse decision, if any, by the jury or by the Court; that you have the right to have your counsel make closing argument to the jury to present witnesses and present evidence that would be favorable to you?

That all of these rights will be waived? They will be given up if the Court accepts your plea of guilty? Do you understand that?

* * *

> Do you have any questions at all about any of these rights that I have specifically mentioned, or any that I have not mentioned, but which you have a question about?

Having responded that he understood that he was waiving his rights and that he did not have further questions, Petitioner also affirmed that no one had frightened or threatened him to force him to plead guilty, and that he had not been promised anything, except the government's dismissal of the remaining counts at sentencing. No mention whatsoever was made of the Sixth Amendment right to confrontation.

Petitioner was advised of the maximum possible sentence: 15 years in jail and a $25,000 fine. Asked whether he was "pleading guilty to the facts contained in Count 1...because [he] in fact did those things, he answered, "Yes, I am convinced myself, that I am guilty."

The court found that Petitioner's plea was made freely and voluntarily and, based on the testimony presented at trial, that the government had established a factual basis for the plea. The court adjudged Petitioner guilty on Count 1 and advised that sentencing would be at least 45 days hence. Co-defendants Bates and Bustamante then tendered pleas of guilty.

On October 11, 1985, through new counsel, Petitioner filed a motion to withdraw his guilty plea, and requested an evidentiary hearing in support of the motion. The motion, which was accompanied by affidavits of the Petitioner, the attorney who represented him when he pled guilty, co-defendant Bates and co-defendant Bustamante, rested on three grounds.

First, Petitioner asserted that his plea was a product of duress and, further, that it was entered in the mistaken belief that it could be withdrawn by him prior to sentencing. The duress, according to Petitioner's affidavit, was a product of several related factors. First, in its plea negotiations with his co-defendants, the government had refused to accept pleas from Bates and Bustamante unless co-defendant Elzel also pled guilty. Elzel consistently refused, placing Bates and Bustamante in an extraordinarily stressful position since they were both facing lengthy sentences; Bustamante, in particular, was a relatively young man who faced a life sentence if convicted of the crimes with which he was charged. At the last moment, Petitioner was led to believe, the government indicated that it would permit him to substitute for Elzel in the package deal, and that it would make deals

with Bates and Bustamante if he would plead guilty. Confined together with Bates and Bustamante, having been awakened at 3:30 AM for trial, and suffering from a lack of adequate sleep, and feeling an hispanic bond of comradeship with his co-defendants, Petitioner believed that he alone stood between Bates and Bustamante and their salvation. Further, either on July 30 or July 31, Paul Elzel, who was in charge of the law library at the prison where the defendants were being held and who Petitioner believed was knowledgable in federal law, had told Petitioner that if he pled guilty he could later withdraw that guilty plea. It was in this condition, having been misinformed by Elzel, under severe pressure from his other co-defendants precipitated by the government's decision to accept only a package deal, and <u>believing</u> that the plea could be withdrawn at

any time before sentence was imposed, that Petitioner pled guilty and told the court that he was guilty, even though he believed himself to be innocent of the charge.

Second, he argued that the guilty plea was invalid because the record failed to establish that he was informed of and understood the conspiracy charge to which he was pleading guilty.

Finally, he argued that he was not adequately informed of the consequences of the plea. Specifically, he was not told and did not know that, notwithstanding the government's agreement to dismiss Counts 2, 8 and 9, the Parole Commission would still consider those counts in determining when Petitioner would be released from confinement.

The government filed no opposition to the motion to withdraw the guilty plea. Nevertheless, without a hearing and without explaining its reasoning, the trial court entered an order denying the motion.

On November 4, 1985, Petitioner was sentenced to the maximum permissible sentence: 15 years in jail and a $25,000 fine.

Petitioner appealed to the United States Court of Appeals for the Eleventh Circuit. On February 25, 1987, that Court rejected his claims that his plea was invalid under Fed. R. Crim. Pro. 11 and that it was error for the court to deny his motion to withdraw his guilty plea and affirmed the judgment of conviction without opinion.*

*The case was not one which, under Eleventh Circuit rules, should or could have been disposed of without opinion. See Rule 25 of the Rules of the United States Court of Appeals for the Eleventh Circuit.

REASONS FOR GRANTING THE WRIT

1. THE COURTS OF APPEALS ARE IN CONFLICT CONCERNING WHAT CONSTITUTES COMPLIANCE WITH RULE 11 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE AND THE EFFECT OF A DISTRICT COURT'S FAILURE TO FOLLOW THE PROVISIONS OF THE RULE

In 1969, recognizing "the importance of the proper construction of Rule 11 to the administration of criminal law in the federal courts," this Court granted certiorari in McCarthy v. United States, 394 U.S. 459, 463 (1969). The case involved the procedure that must be followed under Fed. R. Crim. P. 11 before a United States District Court may accept a guilty plea, and the remedy for a failure to follow that procedure. The Court held, among other things, that the trial judge may not discharge his responsibilities under Rule 11 without inquiry of the defendant into the defendant's understanding of the nature of the charge and the consequences of his plea.

The Court further held that, when the district court does not comply fully with Rule 11, the defendant's guilty plea must be set aside and his case remanded for another hearing at which he may plead anew. Id. at 468.

> [P]rejudice inheres in a failure to comply with Rule 11, for noncompliance deprives the defendant of the Rule's procedural safeguards that are designed to facilitate a more accurate determination of the voluntariness of his plea. Our holding that a defendant whose plea has been accepted in violation of Rule 11 should be afforded the opportunity to plead anew not only will assure that every accused is afforded those procedural safeguards, but also will help reduce the great waste of judicial resources required to process the frivolous attacks on guilty plea convictions that are encouraged, and are more difficult to dispose of, when the original record is inadequate. It is, therefore, not too much to require that, before sentencing defendants to years of imprisonment, district judges take the few minutes necessary to inform them of their rights and to determine whether they understand the action they are taking.

Id. at 471-72.

Although McCarthy was based solely on the Court's construction of Rule 11 and pursuant to the Court's supervisory power, its ruling was designed to implement the Constitutional mandate that a guilty plea can be valid only when it is a voluntary, knowing, intelligent act done with awareness of the relevant circumstances and likely consequences. See Brady v. United States, 397 U.S. 742 (1970); Boykin v. Alabama, 395 U.S. 238 (1969).

Since 1969, Rule 11 has been amended several times. Specifically, Rule 11(c) was amended in 1974 to prescribe more specifically the advice which the trial court must give to the defendant as a prerequisite to the acceptance of a guilty plea,* and to codify the requirements of Boykin v. Alabama, 395

*The former rule required that the court determine that the plea was made with "understanding of the nature of the charge and the consequences of the plea." See Notes of Advisory Committe on 1974 Amendments to Rules.

U.S. 238 (1969), which held that a defendant must be apprised of the fact that he relinquishes certain constitutional rights by pleading guilty. See Notes of Advisory Committee on 1974 Amendments to Rules.

Rule 11(c) presently provides:

> Before accepting a plea of guilty...the court must address the defendant personally in open court and inform him of, and determine that he understands, the following:
>
> (1) the nature of the charge to which the plea is offered,...and
>
> * * *
>
> (3) that he has the right to plead not guilty or to persist in that plea if it has already been made, and he has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself; and
>
> (4) that if his plea of guilty...is accepted by the court there will not be a further trial of any kind, so that by pleading guilty...he waives the right to a trial....

In addition, a 1983 amendment added a "harmless error" provision to the Rule:

> (h) Any variance from the procedures required by this rule which does not affect substantial rights shall be disregarded.

The drafters had recognized that, as the Rule 11 procedures had become more lengthy and detailed, there was an increased risk that a trial judge, in a particular case, might deviate to some degree from the procedure which a very literal reading of the Rule would appear to require, and that a harmless error rule, consistent with Rule 52(a), was appropriate. Still, the drafters emphasized two important "cautionary notes." First,

> [S]ubdivison (h) should not be read...as, in effect nullifying important Rule 11 safeguards...
>
> Indeed, it is fair to say that the kinds of Rule 11 violations which might be found to constitute harmless error upon direct appeal are fairly limited, as in such instances the matter must be resolved solely on the basis of the

> Rule 11 transcript and the other portions...of the limited record made in such cases....
>
> The second cautionary note is that subdivision (b) should not be read as an invitation to trial judges to take a more causal approach to Rule 11 proceedings.

Notes of Advisory Committee on 1983 Amendment to Rules.

In spite of the increased clarity and specificity of Rule 11(c) -- or perhaps because of the harmless error provision of Rule 11(b) -- the decisions of the Courts of Appeals have not been in harmony concerning the requirements of Rule 11, and the remedy for noncompliance. Indeed, serious conflicts in the Circuits have arisen.

A. Nature of the Charge

> Rule 11(c)(1) requires that:
>
> Before accepting a plea of guilty...the court must address the defendant in open court and inform him of, and determine that he understands....

> (1) the nature of the charge to which the plea is offered.

The Courts of Appeals for the Fifth and First Circuits have held that this requires, at minimum, that the defendant be read the indictment.

> For simple charges..., a reading of the indictment, followed by an opportunity given the defendant to ask questions about it, will usually suffice. Charges of a more complex nature, incorporating esoteric terms or concepts unfamiliar to the lay mind, may require more explication. In the case of charges of extreme complexity, an explanation of the elements of the offense like that given the jury in its instructions may be required....

United States v. Dayton, 604 F.2d 931, 938 (5th Cir. 1979) (en banc), cert. denied, 445 U.S. 904 (1980); Mack v. United States, 635 F.2d 20, 25 (1st Cir. 1980). See also United States v. Punch, 709 F.2d 889 (5th Cir. 1983); United States v. Jack, 686 F.2d 226, 230 (5th Cir. 1982); United States v. Rodriquez-DeMaya, 674 F.2d 1122, 1126 (5th Cir. 1982).

The Eleventh Circuit, at least in this case, applied a different rule for it refused to recognize as invalid a plea entered without the charge even having been read to the defendant. And it did so in a case where the charge was a particularly complex conspiracy charge, with two substantive crimes as its objectives and where federal jurisdiction over one of those crimes was based on rather obscure notions of extraterritorial jurisdiction.

None of the elements of the crime of conspiracy was mentioned, nor were the two crimes which were supposed to be the conspiracy's objects explained. No mention was made of the fact that the essence of the offense of conspiracy is a mutual agreement by two or more persons to disobey the law. Petitioner was not told that the government would have to prove, beyond a reasonable

doubt, that the conspiracy existed, as charged, and that he had willfully become a member of it. The court merely called to Petitioner's attention the paragraph of the indictment which charged that he "would institute and supervise security procedures to safeguard against the seizure of cocaine and currency and the arrest and incarceration of members of the conspiracy." And the court adverted to the single overt act in which he was mentioned, a single meeting with co-defendant Bates and another. The heart, of course, of a conspiracy charge is an agreement among the co-conspirators, yet the word agreement was never uttered. Indeed, in paraphasing the introductory language of Count I, the court omitted the word "agree," which was in the indictment. A review of the Rule 11 proceeding demonstrates that the charge was not adequately explained. See United States

v. Darling, 766 F.2d 1095 (7th Cir.), cert. denied, 106 S.Ct. 579 (1985) (where indictment was not read to defendant, and judge made no effort to explain the law of conspiracy either generally or by reference to the particular charge in the case, prosecutor's statement of factual basis and court's colloquy with defendant were insufficient to show that he understood the charge; guilty plea vacated and remanded for repleading); United States v. Wetterlin, 583 F.2d 346 (7th Cir. 1978), cert. denied, 439 U.S. 1127 (1979).

The Eleventh Circuit's disposition of this case demonstrates that there is a serious conflict in the Circuits as to one of Rule 11's core concerns -- a judge's obligation under Rule 11(c)(1) to explain to the defendant the nature of the charge to which he

is offering to plead guilty. For that reason alone, the granting of certiorari would be warranted.*

B. The Consequences of the Plea

Among Rule 11's core concerns is that the defendant know and understand the consequences of his plea. To guarantee that there is such knowledge and understanding, Rule 11(c) is explicit. It requires that the defendant be informed, and that it be determined that he understands

> (3) that...he had the right...at trial...to confront and cross-examine witnesses against him...and
>
> (4) that if his plea of guilty...is accepted by the court there will not be a further trial of any kind, so that by pleading guilty...he waives the right to trial.

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*The result in this case cannot be explained by reference to a harmless error anlaysis because the omission goes to one of Rule 11's core concerns and there is nothing in the record to indicate that Petitioner understood the nature of the charge to which he entered a guilty plea.

The Court of Appeals for the Eleventh Circuit has affirmed the judgment of conviction, and refused to permit Petitioner to replead, even though he was not properly informed of either, a result inconsistent with both Rule 11 and the rulings of other Federal Courts of Appeals.

1. Right of Confrontation

At the Rule 11 hearing in this case, the trial court adverted to some of the Constitutional rights which Petitioner would be giving up by pleading guilty, but the Sixth Amendment right of confrontation was not among them. Nevertheless, the plea has been upheld by the Court of Appeals for the Eleventh Circuit, a result in conflict with rulings of the Court of Appeals for the Third Circuit.

In United States v. Carter, 619 F.2d 293 (3d Cir. 1980), the Third Circuit Court of Appeals vacated a guilty plea entered by a

defendant who had not been told of his right to confront and cross-examine the witnesses who would testify against him. The Court refused to deem the error harmless for the right of confrontation is "of fundamental proportions, Pointer v. Texas, 380 U.S. 400...(1965)," id. at 295, and refused to "assume that [defendant] was aware that the right of cross-examination is implicit in the right of trial." Id. at 275, n.7. The Court also concluded that the result it reached was consistent with the needs of both the system of criminal justice and of the criminal defendant.

The Third Circuit recognized that guilty pleas serve multiple interests of both the criminal justice system and the individual criminal defendant. Administratively, the criminal justice system has come to depend heavily on guilty pleas. Moreover, the

practice of accepting guilty pleas insures prompt application of punitive and correctional measures and furthers society's interest in deterrence of crime and rehabilitation of criminals. The Court continued:

> Overall, therefore, it is evident that insofar as societal concerns are involved, the success of our criminal justice system depends, in large part on an efficient, swift, supervised and thorough plea agreement process which is not subject to disruption or excessive delays.
>
> From the standpoint of the criminal defendant, the system for accepting guilty pleas is equally, and perhaps even more, important. The criminal defendant's overriding concern, which has constitutional overtones, see Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), is that he not plead guilty to a crime unless, and until, he has had explained to him and understands all of his constitutional rights and protections. This is a concern which society acknowledges and safeguards. Because our system of criminal justice is predicated upon fundmental fairness, society has consistently recognized that it is vital that the interests of each

> criminal defendant be protected to the fullest in plea proceedings. See id.
>
> Thus, although starting from what superficially would appear to be two different premises for requiring an efficient plea process, it is clear that both society and the individual defendant have arrived at an identical interest in the means by which their respective purposes are to be achieved -- an effective, thorough, complete and meaningful plea proceeding. Imprecision in the manner in which these proceedings are conducted disserves the interests of both society and the criminal defendant. On the one hand, a failure to properly apprise the criminal defendant of his rights leads to an unknowing, unintelligent and involuntary waiver. On the other hand, to the extent that improperly administered pleas generate and encourage appeals which are time consuming, burdensome and difficult to process, the societal interests in rehabilitiation, speedy justice, swift punishment and deterrence are thwarted.

Because the Court of Appeals for the Eleventh Circuit affirmed without opinion, it is impossible to know precisely the reasoning it employed in reaching its decision. It may

have followed United States v. Guichard, 779 F.2d 1139 (5th Cir.), cert. denied, 106 S.Ct. 1654 (1986), which -- in conflict with United States v. Carter -- employeed a harmless error analysis to a trial court's failure to advise the pleading defendant of his right to confrontation.

> Appellant knew he had waived a trial at which he did not have to testify and the government had to affirmatively prove his guilt, and could not rely on any failure of his to testify, all of which to a significant extent implies a waiver of the right to cross examination...We find therefore that appellant knew the consequences of his plea.

United States v. Guichard, 779 F.2d 1139, 1142-43 (5th Cir. 1986).* To resolve the

*In Carter, the Court of Appeals for the Third Circuit explicitly rejected the proposition that knowledge of other rights, specifically the right to trial and the right against self-incrimination, "implies a waiver of the right of confrontation." To be sure, the waiver of trial automatically waives the right to confrontation, and thus "implies it." But that begs the question: did the defendant know

(footnote continued)

conflict in the Circuits, the grant of the petition is warranted.

2. Waiver of the Right to Trial

In this case, Petitioner maintained that his plea was invalid under Rule 11 for yet another reason.

In his affidavit in support of his motion to withdraw his guilty plea, Petitioner asserted that, when he entered his plea of guilty, he believed, based on what he had been told by Elzel, that he could later withdraw it, at least until the time of sentencing.

There is nothing which occurred at the Rule 11 hearing which would or could have disabused him of his misunderstanding. On the contrary, everything that happened during the Rule 11 colloquy was consistent with his

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(footnote continued from previous page)
he would have a right of confrontation at trial. Neither waiver of jury trial or of self-incrimination suggests or implies such knowledge.

understanding. Indeed, while it is manifest that Judge King did not intend to mislead Petitioner in any way, given Petitioner's beliefs, Judge King's advice could only have confirmed his erroneous belief. Where the defendant is a foreigner whose first language is not English and whose familiarity with American law and legal procedures is non-existent, there is a special obligation on the trial judge to make his explanations clear, precise, unambiguous and complete. And, even apart from any special obligation due to the circumstances, Judge King's conduct of the Rule 11 hearing was not consistent with Rule 11's mandate.

In this portion of the Rule 11 colloquy, Judge King first asked Petitioner whether his lawyer had explained his rights to him.

Petitioner gave his usual, "yes, Your Honor" response. Then the court asked whether counsel had told him

> that you would be entitled to continue with this jury trial, which is now in its fourth day, and that you would be entitled to go forward with the trial...Has he told you that; that you have the right to go forward? (Emphasis added.)

Madrid answered, again, "Yes, Your Honor."

> Has he told you that you have the right in this jury trial to call witnesses..., take the witness stand and testify...
>
> That you have the right to take on appeal from any adverse decision, if any, that all of these rights will be waived? They will be given up if the Court accepts your plea of guilty? Do you understand that?
>
> Yes, Your Honor. (Emphasis added.)

The Court never advised the defendant, as Rule 11(c)(4) requires, that that there would not be a further trial of any kind, so that by pleading guilty he was irrevocably waiving his right to any future trial. Indeed, by

emphasizing that Petitioner would be waiving his right to continue with this trial, and by failing, in disregard of Rule 11, to mention that there would not be a further trial of any kind, the record is entirely consistent with Petitioner's belief that he was not relinquishing, or intending to relinquish, the ability to withdraw the guilty plea before sentencing and go to trial before another jury.

In his uncontroverted affidavit, Petitioner swore that, at the time he pled guilty he had been informed by Elzel, a jailhouse lawyer, and did believe, that he would be able to withdraw the plea prior to sentencing if he so chose. The belief is not unreasonable on its face. Petitioner is a Venezuelan national; he is not a lawyer, and he is not familiar with American law. Judge King's emphasis on this trial was consistent

with his belief. And, although Petitioner has since learned that a defendant has no absolute right to withdraw a guilty plea, his initial understanding was not that wide of the mark. Some Justices of this Court have taken the position that, as a matter of Constitutional right, where the defendant presents a reason for vacating his plea and the government has not relied on the plea to its disadvantage, the plea may be vacated and the right to trial regained, at least where the motion to vacate is made prior to sentence and judgment. See Neely v. Pennsylvania, 411 U.S. 954 (1973) (Douglas, Stewart, Marshall, JJ., dissenting from the denial of certiorari); Santobello v. New York, 404 U.S. 254, 267 (Marshall, Brennan, Steward, JJ., concurring in part and dissenting in part). And the Federal Rules of

Criminal Procedure do provide that withdrawal is to be permitted liberally for any fair or just cause. See Point II, infra.

Petitioner's mistake of law was a fundamental one which went to the very heart of the matter. Because Judge King deviated from the mandate of Rule 11, that mistake was never exposed nor corrected prior to the entry of the plea. A plea which is entered as a result of a mistake or ignorance, or without an understanding of the important Constitutional rights which the plea waives, is not a valid plea. Fed. R. Crim. P. 11. Cf. United States v. Norman, 767 F.2d 455 (8th Cir. 1985) (court admonished defendant that he would have no right to withdraw his plea). As the record stands, there is an uncontradicted assertion that Petitioner entered his plea based on his mistaken belief that it could be withdrawn up until the time of sentencing.

Under these circumstances, the Rule 11 defect could not be deemed harmless, and the plea should have been vacated because it is invalid.

Because the Eleventh Circuit's refusal to do so cannot be squared with Rule 11 or the holdings of the other Courts of Appeals, certiorari should be granted.

II. THE COURTS OF APPEALS ARE IN CONFLICT REGARDING THE APPROPRIATE STANDARD FOR PERMITTING A GUILTY PLEA TO BE WITHDRAWN PRIOR TO SENTENCING, PURSUANT TO RULE 32(d) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

This case also presents a question never addressed by this Court and as to which there is a split among the Courts of Appeals: under what circumstances should a district court permit a defendant to withdraw his guilty plea where the defendant seeks to do so before sentence is imposed. The problem is addressed in Rule 32(d) of the Federal Rules of Criminal Procedure, but, as this case demonstrates, that Rule has been interpreted in various, and inconsistent, ways by the Federal Courts of Appeals.

Rule 32(d) of the Federal Rules of Criminal Procedures, as amended in 1983, provides:

> If a motion for withdrawal of a plea of guilty...is made before sentence is imposed...the court may permit withdrawal of the plea upon a showing by the defendant of any fair and just reason.

The "fair and just reason" standard is derived from Kercheval v. United States, 274 U.S. 220, 223-24 (1927):

> Out of just consideration for persons accused of crimes, courts are careful that a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences. When one so pleads he may be held bound...But, on timely application, the court will vacate a plea of guilty shown to have been unfairly obtained or given through ignorance, fear or inadvertance. Such an application does not involve any question of guilt or innocence...The court in excercise of its discretion will permit one accused to substitute a plea of not guilty and have a trial if for any reason the granting of a trial seems fair and just. (citations omitted)

Most of the courts called upon to apply Rule 32(d) have held that when leave to withdraw a guilty plea is sought prior to

sentence, it should be "freely allowed." See e.g., United States v. Roberts, 570 F.2d 999 (D.C. Cir. 1977); United States v. Carden, 599 F.2d 1320 (4th Cir.), cert. denied, 444 U.S. 874 (1979); United States v. Pressley, 602 F.2d 709 (5th Cir. 1979); United States v. Herrold, 635 F.2d 213 (3d Cir. 1980); United States v. Hancock, 607 F.2d 337 (10th Cir. 1979). In fact, four Justices have expressed the view that, as a matter of Constitutional right, where the defendant presents a reason for vacating his plea, and the government has not relied on the plea to its disadvantage, the plea may be vacated and the right to trial regained, at least when the motion to vacate is made prior to sentence and judgment. See Neely v. Pennsylvania, 411 U.S. 954 (1973) (Douglas, Stewart, Marshall, JJ., dissenting from the denial of certiorari. See also

Santobello v. New York, 404 U.S. 254, 267 (1971) (Marshall, Brennan, Stewart, JJ., concurring in part and dissenting in part).

The Eleventh Circuit alone apparently applies a different standard. In two recent cases, it held that a plea which is valid under Rule 11 may be withdrawn "if the interest of justice so requires." United States v. Stitzer, 785 F.2d 1506 (11th Cir. 1986); United States v. Campbell, 778 F.2d 764, 767 (11th Cir. 1985). Apparently applying this very stringent standard, the Court of Appeals affirmed the district court's denial -- without opinion -- of the defendant's pre-sentence motion to withdraw his guilty plea.

This case thus presents an opportunity for this Court to give the lower federal courts guidance with respect to the proper application of Rule 32(d), and how the trial

courts may properly exercise discretion in deciding motions brought prior to sentencing under the rule. It also presents an opportunity for this Court to correct a manifest miscarriage of justice for, under any appropriate interpretation of Rule 32(d), Petitioner's application to withdraw his guilty plea should not have been disallowed under the circumstances presented here.

As argued in Point I, because the record here fails to establish that the charge was adequately explained, that Petitioner knew when he entered the plea that he would have no right to withdraw it, and that he had, and was relinquishing, his right of confrontation, Petitioner's plea was not knowing and voluntary as required by both the Constitution and Rule 11. Where a defendant has shown that his plea was not knowing and voluntary in the Constitutional sense, he has necessarily

demonstrated good cause under Rule 32(d) to withdraw it. But quite clearly it is not only pleas which are Constitutionally infirm that are subject to correction under Rule 32(d). A plea which is not "involuntary" in the Constitutional sense may still be subject to withdrawal on the ground of involuntariness under Rule 32(d). Similarly, a plea made with an understanding only of its direct consequences may be Constitutionally valid, but a misunderstanding of collateral consequences may justify relief under Rule 32(d).

In this case, Petitioner contends that his plea was the product of duress and thus it was not a truly voluntary act. The government's refusal to enter into an agreement with co-defendants Bates and Bustamante, unless Petitioner went along, caused those co-defendants to place

extraordinary psychological pressure on Petitioner. In their view, and in his, he alone could save them. Having been awakened for several days in a row in the middle of the night for transportation to court and having been confined with his co-defendants in a pressure-cooker atmosphere since the beginning of the trial, Petitioner was subject to pressures which combined to render his decision something short of the product of his free will. Cf. United States v. Trugler, 493 F.2d 574 (4th Cir. 1974) (vacating conviction and finding ineffective assistance of counsel where defendant pled guilty after defense counsel advised him that if he did not, all five defendants would go to jail, including a woman who would otherwise get probation). See also United States v. Sanderson, 595 F.2d 1021 (5th Cir. 1979); United States v. Marzgliano, 588 F.2d 395 (3d Cir. 1978). In sum, the

record is consistent with Madrid's contention that his guilty plea was the product of "mental coercion overbearing [his] will." United States v. Deal, 678 F.2d 1062, 1066 (11th Cir. 1982).

Rule 11 imposes upon a district court the obligation to conduct a searching inquiry into the voluntariness of a defendant's plea. E.g., McCarthy v. United States, 394 U.S. 459 (1969). Even if the inquiry into voluntariness in this case may be deemed sufficient to show that the plea was voluntary in the sense that no one had coerced Petitioner to plead through threats or physical intimidation, that does not end the inquiry. The Rule 11 colloquy did nothing to expose or dissipate the pressures under which the plea decision had been reached.

A plea entered as a result of overwhelming pressures exerted on the defendant by his co-defendants is a plea from which relief should lie. It has been said that "[a]dvice -- even strong urging -- by those who have an accused's welfare at heart, based on the strength of the case and the weakness of the defense, does not constitute undue coercion." Wojtowicz v. United States, 550 F.2d 786 (2d Cir.), cert. denied, 431 U.S. 972 (1977), quoting Lunz v. Henderson, 533 F.2d 1322, 1327 (2d Cir.), cert. denied, 429 U.S. 849 (1976). But, significantly, the "urgings" here were of a very different sort; Bustamante's and Bates' supplications were hardly the urgings of persons with the accused's interests at heart, based on legitimate considerations such as the strength of the government's case and the weakness of the defense. These were urgings motivated

only by the self-interest of those whose interests were inconsistent with Petitioner's. They were, moreover, urgings calculated to prey on a weakened and vulnerable defendant's misguided leanings towards martyrdom.

On the record here, in the absence even of any statement of government opposition, it is impossible to determine on what basis, if any, the trial court denied Petitioner's motion to withdraw his guilty plea. Nor is it possible to determine the precise basis on which the Court of Appeals affirmed. Yet the record of the Rule 11 hearing leaves substantial doubt as to the validity of the plea. Even if the Rule 11 proceeding were deemed adequate to establish the plea's validity, a separate inquiry under Rule 32(d) was still required. "Courts must always be diligent to ascertain whether a plea of guilty was understandingly made, and when it appears

before sentencing that such a plea was entered by a defendant who did not understand the charge or acted as a result of mistake, it is an abuse of discretion not to permit the plea to be withdrawn." United States v. DeLeon, 355 F.2d 286 (5th Cir. 1966).

Petitioner is serving a lengthy prison term following a plea of guilty entered without the court having advised him of the nature of the charges, the constitutional rights he was reliquishing and the irrevocability of his plea. His prompt application to withdraw that plea -- based on his misunderstanding which had been unintelligently reinforced by the district judge that the plea was not final -- was denied without hearing and without any explanation, even through the record indicates no opposition by the government. The Court of Appeals -- also without explanation --

affirmed the judgment of conviction. To have done so, it must have applied rules of law at variance with the law recognized in the other Circuits. The issues raised are of substantial importance to the Federal Criminal Justice system. Accordingly, the petition for a writ of certiorari should be granted.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit should be granted.

Respectfully submitted,

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Dated: New York, New York
May 22, 1987

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

DO NOT PUBLISH

No. 85-5984

D.C. Docket No. 84-00493

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

LIZARDO MARQUEZ-PEREZ,
PAUL ETZEL, FELIX DIXON BATES,
Defendant-Appellant.

Appeals from the United States District Court
for the Southern District of Florida

(February 25, 1987)

Before FAY and CLARK, Circuit Judges, and HENDERSON, Senior Circuit Judge.

PER CURIAM: AFFIRMED. See Circuit Rule 25.

Judgment Entered: February 25, 1987
For the Court: Miguel J. Cortez,
Clerk

By: David Maland
Deputy Clerk

ISSUED AS MANDATE: MAR 20 1987

SUPREME COURT OF THE UNITED STATES

No. A-742

LIZARDO MARQUEZ-PEREZ,

Applicant,

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the applilcation of counsel for the applicant,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and inclduing May 26, 1987.

/s/ Lewis F. Powell, Jr.
Associate Justice of the
Supreme Court of the
United States

Dated this 9th
day of April, 1987.